LIOW SAT FUNG v. PRIMAL LUB SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CIVIL SUIT NO: BKI 12ANCvC-8-11-2014]
9 JANUARY 2015

CIVIL PROCEDURE: *Summary judgment – Triable issues – Assignment of debt – First defendant assigned debt of second defendant to plaintiff – Failure of second defendant to sign deed of assignment – Whether consent of second defendant required – Whether sum due to plaintiff charged under debenture – Whether triable issues arose*

On 14 October 2013, the appellant ('the plaintiff') obtained judgment against the first respondent ('the first defendant') for the sum of RM401,828.03 ('judgment sum'). The first defendant owned four shop houses and due to its failure to settle the judgment sum, the plaintiff issued prohibitory orders on the said shop houses. Earlier in June 2013, the first defendant entered into a sale and purchase agreement with the second respondent ('the second defendant') in respect of the said shop houses and a common solicitor was appointed for this sale transaction. In October 2013, the second defendant had yet to settle the balance purchase price to the first defendant. The first defendant proposed to assign the sum of RM200,000 of the balance due to them from the second defendant to the plaintiff as settlement of the judgment sum. In light of this, the plaintiff and the first defendant signed a deed of settlement and a deed of assignment. As a result, the plaintiff agreed to forbear from executing the judgment against the first defendant in exchange for the said sum of RM200,000. Since there was a common solicitor for the defendants, it was argued that the second defendant had knowledge about this assignment. However, the second defendant's director refused to sign the deed of assignment. In July 2014, the first defendant informed the plaintiff that the sum of RM200,000 would not be paid since the sum was charged to Maybank under a debenture. It was further argued that there was a mistake since the second defendant was not aware of the debenture and the first defendant did not disclose it earlier. Despite the plaintiff's notice, the second defendant did not release the sum. As such, a suit was filed against the defendants and an application for summary judgment was made in which the plaintiff applied for an order against the second defendant to compel them to pay the sum of RM200,000. The Sessions Court, however, dismissed the application holding that there were triable issues since the second defendant did not sign the deed of assignment. Hence, this appeal. The first defendant did not oppose the appeal and agreed to abide by the decision of this court.

Held (allowing appeal):

(1) Summary judgment should be granted in cases where there is no triable issue. However, issues of law or construction which do not require a trial can be addressed in a summary judgment application. (para 3)

(2) The fact that the first defendant had executed an assignment in favour of the plaintiff for part of the balance due to them from the second defendant in connection with the sale of the four shop houses was undisputed. No triable issue arose from the fact that the second defendant did not sign the deed of assignment. The relationship between the plaintiff and the first defendant was one of assignor and assignee and the relationship between the second defendant and the first defendant was one of debtor and creditor. The first defendant had assigned the debt of the second defendant to the plaintiff. There was no requirement in law for the consent of the debtor, *ie*, the second defendant to the assignment agreement between the assignor and assignee. (paras 3 & 4)

(3) The second defendant had all along been 'in the loop' regarding the preparation and execution of both the deed of settlement and the deed of assignment. The plaintiff's solicitors had communicated directly with the defendants' solicitors in respect of the deed of assignment. Further, the plaintiff's solicitors had issued a notice demanding payment from the second defendant. As such, the fact that the second defendant's directors did not sign the deed of assignment could not raise triable issue as the relevant parties to the said deed were the plaintiff and the first defendant. (para 6)

(4) Maybank should be aware of the plaintiff's claim under the deed of assignment since the second defendant stated that they had communicated with them. However, Maybank did not intervene in this action to claim priority of payment. Further, there was no evidence about the crystallisation of the floating charge or its terms and conditions. As such, the second defendant's concern in respect of the potential claim by Maybank could not possibly raise a triable issue against the plaintiff's claim as an assignee of a debt under a valid deed of assignment. (para 9)

(5) The mistake or ignorance about the debenture was not a matter that was relevant to the plaintiff's pleaded case which was purely based on the deed of assignment executed by the second defendant. Further, 'mistake' as defence was not pleaded by the second defendant. Since Maybank had not intervened and the deed of assignment was not disputed by the first defendant, the summary judgment application based on the deed of assignment should be decided without regard to the potential priority claim of Maybank. As the plaintiff had verified the underlying facts of the claim and no triable issues were raised by the second defendant, the summary judgment ought to be granted. (para 10)

Case(s) referred to:

Kam Pau Siong & Anor v. Wilayah Fabrication Sdn Bhd & Ors [2004] 2 CLJ 816 CA ***(refd)***

Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***

For the appellant/plaintiff - Ting Sing Chuan; M/s Ting Anuar & Co
For the 1st respondent/1st defendant - George Aludah; M/s Aludah & Co
For the 2nd respondent/2nd defendant - Terrence Lee; M/s Lam & Co

Reported by Kumitha Abd Majid

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is an appeal by the plaintiff against the refusal of the Sessions Court to grant summary judgment. The first defendant did not oppose the appeal. Instead, their counsel had agreed to abide by any decision by this court. This stance of the first defendant is not surprising in view of the background facts.

Summary Of Background Facts

[2] The plaintiff's case against the defendants is as follows. The plaintiff had obtained judgment against the first defendant in the sum of RM401,828.03 on 14 October 2013. The first defendant failed to settle the judgment sum. The plaintiff took steps to execute the judgment by issuing prohibitory orders on four shop houses belonging to the first defendant. The first defendant had purchased the four shop houses from the developer but strata title had not been issued yet. The first defendant proposed a settlement to pay the judgment sum to the plaintiff. Earlier, in June of 2013, the first defendant had entered into a sale and purchase agreement in respect of the four shop houses with the second defendant. Messrs Sia Mojilip & Nasir was the common solicitor of the first defendant and the second defendant in the sale and purchase transaction. In October of 2013, the balance of the purchase price had yet to be paid to the first defendant by the second defendant. The first defendant wrote a letter dated 20 December 2013 proposing to assign RM200,000 of the balance due to them from the second defendant to the plaintiff as settlement of the judgment sum. The plaintiff deposed that it was represented by Sia Mojilip & Nasir that there is at least RM320,000 due to the first defendant from the proceeds of the sale from the second defendant. The plaintiff agreed to accept RM200,000. The plaintiff and the first defendant signed a deed of settlement and deed of assignment. Thus the balance or in other words the debt owing to the first defendant was assigned to the plaintiff. In the letter dated 22 December 2013, the plaintiff agreed to forbear from executing their judgment against the first defendant in exchange for payment of the said sum of RM200,000. Thus the plaintiff did not proceed with the prohibitory orders on the four shop houses. As Sia Mojilip & Nasri was the common solicitor of both defendants and had liaised with the solicitor of the plaintiff, it is apparent that second defendant had knowledge of this assignment. However, the second defendant's directors did

not sign the deed of assignment. The plaintiff alleged that they did not sign because their directors were out of the country at the time and later they refused to sign it. On 25 July 2014, the first defendant wrote to the plaintiff's solicitors to inform them that the sum of RM200,000 would not be paid as the said sum is charged to Maybank under a debenture. On 25 July 2014, the plaintiff gave notice to the second defendant's solicitors for release of the said RM200,000 but the second defendant did not comply. In this summary judgment application, the plaintiff has applied for an order against the second defendant to compel them to pay the sum of RM200,000. The plaintiff has not prayed for any order against the first defendant who still remain as their judgment debtor.

Whether Any Triable Issue?

[3] I bear in mind that summary judgment should only be granted in cases where there is no triable issue. However, issues of law or construction which do not require a trial can be addressed in a summary judgment application. The learned Sessions Court Judge did not grant summary judgment because the second defendant did not sign the deed of assignment and thus he found that there are triable issues. Counsel for the plaintiff has submitted that there are no triable issues in this case notwithstanding the failure of the second defendant to sign the deed of assignment. He urged the court to order the second defendant to comply with the notice given by the plaintiff pursuant to the said deed and pay up. Apart from the purported claim of Maybank *via* the said debenture, the facts underlying the claim of the plaintiff are largely undisputed by the second defendant. The crucial facts not in dispute are that the first defendant had executed an assignment in favour of the plaintiff for part of the balance due to them from the second defendant in connection with the sale of the four shop houses. The second defendant did not also dispute that the plaintiff forbore to proceed with the execution of the judgment against first defendant because of the deed of settlement and the deed of assignment. I shall now consider whether there are any issues that merit a trial.

[4] The learned Sessions Court Judge found that the fact the second defendant did not sign the deed of assignment is important and that it raises a triable issue. Counsel for second defendant also highlighted this fact. However, I accept the argument of counsel for the plaintiff that no triable issue arise from the fact that the second defendant did not sign the deed of assignment. The relationship between the plaintiff and the first defendant is one of assignor and assignee. The relationship between the second defendant and the first defendant is one of debtor and creditor. The first defendant had assigned the debt of the second defendant to the plaintiff. There is no requirement in law for the consent of the debtor, ie, for the consent of the second defendant to the assignment agreement between the assignor and assignee. This is clearly explained in the following passage from the judgment

of the Federal Court in the case of *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635 which was cited by counsel for the plaintiff:

> At common law, (in the special sense now of its being distinguished from rules in equity), contractual rights, eg, as to debts were not assignable, ie, transferable to another person without the consent of both parties to the contract conferring such contractual rights. Equity stepped in and has long allowed such assignment of such debts to another person who is not privy to the contract in respect of such debts, without at all the consent of the debtor, see eg, *Brice v. Bannister* [1878] 3 QB 569 and even without notice to the debtor, see *Kelly v. Selwyn* [1905] 2 Ch 117, and *Ward v. Duncombe* [1893] AC 369. Such assignments as so allowed by equity are called equitable assignments. (emphasis added)

[5] However, the Federal Court said that it is desirable for the assignee to give notice of the assignment to the debtor:

> We need to say a few words more about the great desirability of giving notice of assignment of a debt, by an assignee to the debtor, even though absence of such notice does not affect the validity of the equitable assignment as between the assignor and the assignee. If notice is not given, the assignee must give credit for any payment made to the assignor by the debtor.

[6] In the instant case, the second defendant had all along been 'in the loop' regarding the preparation and execution of both the deed of settlement and deed of assignment. Messrs Sia Mojilip & Nasir was the common solicitor of both defendants in the sale and purchase transaction in respect of the four shop houses. It was not disputed that the plaintiff's solicitors communicated directly with Messrs Sia Mojilip & Nasir in respect of the deed of assignment. Furthermore, the plaintiff's solicitors had issued a notice demanding payment to the second defendant. Therefore, the fact that second defendant's directors did not sign the deed of assignment cannot raise triable issue as the relevant parties to the said deed are the plaintiff and the first defendant.

[7] Counsel for the second defendant submitted that Maybank would have priority by virtue of the debenture. However, the submission of counsel for the plaintiff that the second defendant did not give any details of the debenture especially in respect of the date of crystallisation of the floating charge was unchallenged. In the Court of Appeal case of *Kam Pau Siong & Anor v. Wilayah Fabrication Sdn Bhd & Ors* [2004] 2 CLJ 816 it was held that the debenture holder bore the evidential burden of proving that the debenture had crystallised and that such crystallisation occurred pursuant to the terms and conditions of the debenture. It was held that in the said case that the debenture holder had merely shown the existence of the debenture and nothing more.

[8] Counsel for second defendant submitted that there is nothing to assign in the instant case because of the debenture. He submitted as follows:

> I respectfully say that there was nothing capable of being assigned as it was discovered after the email that there was a claim by Maybank. As a purchaser, the 2nd Respondent was not able to complete the drawdown, which it wanted to, because of the claim by the debenture holder. There was nothing left to assign by the 1st Defendant because of the claim by Maybank. If Maybank's claim is not satisfied, then the Respondent's Bank, UOB would not be able to secure the properties free from previous encumbrance.

[9] However, in the instant case, there is no evidence at all about the crystallisation of the floating charge or its terms and conditions. The only reference to the debenture is the averment of the second defendant that Maybank has prior right to the payment of the balance and that this fact was not brought to their attention earlier. Maybank should obviously be aware of the claim of the plaintiff under the deed of assignment as the second defendant has stated that they have communicated with them. However, Maybank has not intervened in this action to claim priority of payment. In the premises, the concern of the second defendant in respect of the potential claim of Maybank cannot possibly raise a triable issue as against the claim of the plaintiff as an assignee of a debt under a valid deed of assignment.

[10] During argument, counsel for second defendant submitted that there was a 'mistake' in this case because the second defendant was not aware of the debenture. He said the first defendant should have been aware of the debenture but did not disclose it earlier. I note that 'mistake' as defence was not pleaded by the second defendant in the statement of defence. In the affidavit in opposition, they alluded to the lack of knowledge about the debenture. However, this 'mistake' or ignorance about the debenture is not a matter that is relevant to the pleaded case of the plaintiff which is purely based on the deed of assignment executed by the second defendant. Since Maybank has not intervened and the deed of assignment is not disputed by the first defendant who is the assignor, the summary judgment application based on the deed of assignment should be decided without regard to the potential priority claim of Maybank. As the plaintiff has verified the underlying facts of the claim and no triable issue is raised by the second defendant, in my view, summary judgment ought to be granted.

[11] I shall therefore allow the appeal and enter summary judgment in terms of the application of the plaintiff. The second defendant to pay costs of RM5,000 to the plaintiff here and below.